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No. 04-1327

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States.[1] The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

STATEMENT OF THE CASE

The issues presented here often occur in cases that NACDL's members defend; namely, the evidentiary standards applicable to third-party guilt defenses. A patchwork of such standards presently exists, but even so, South Carolina's standard far more restrictive than that of other states and plainly far more restrictive than is constitutionally permissible. From the unique perspective of defense counsel whom must struggle with these standards in the course of everyday practice, NACDL seeks to address to address two issues of importance in this case. First, standards like South Carolina's cannot pass constitutional muster because they remove from the hands of jurors factual decisions that are

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief, and no person of entity, other than the amici curiae, their members and their counsel made a monetary contribution to the preparation or submission of this brief.

uniquely the province of those jurors; namely, the weight to be given to evidence that is both relevant and probative of doubt as to the defendant's guilt. Second, NACDL addresses what type of third-party guilt standard exists that would pass constitutional muster.

At his trial on Capital murder charges, petitioner Bobby Lee Holmes sought to introduce evidence that another person, Jimmy White, a violent felon who more closely matched the physical description given by the victim, actually committed the crime. This evidence included testimony of four independent witnesses that White confessed to the crime. Petitioner also sought to introduce the testimony of four "proximity witnesses" who placed White near the victim's apartment near the time of the crime and at least two witnesses who saw White heading toward the victim's apartment building near the time of the attack. Petitioner's proffered evidence also included testimony of witnesses as to White's professed sexual interest in women around the age of the victim as well as his violent nature. Finally, Petitioner proffered evidence that the police, who had been told that White had been near the victim's apartment near the time of the attack, failed to test a footprint found near the victim's apartment which did *not* match Petitioner's, and that the police failed to test White's clothes for the victim's blood.

In a pre-trial hearing the trial judge, while acknowledging that Petitioner's proffered third-party guilt evidence was relevant, nonetheless ruled that the evidence was inadmissible. The trial judge found that White's multiple confessions must be excluded as hearsay, and that without the confessions the rest of the third-party guilt evidence did not clearly point to White as the perpetrator. On appeal the South Carolina Supreme Court did not follow the trial court's rationale for excluding the evidence, but nonetheless affirmed the trial court's ruling on the ground that the prosecution's case was "strong" and Petitioner had not "overcome" it with his proffered evidence of White's guilt.

SUMMARY OF THE ARGUMENT

As this Court has repeatedly recognized, a person charged with a crime has the right, through the Sixth and Fourteenth Amendments, to a fair opportunity to put forth a full and complete defense, unencumbered by burdensome and unfair "special" standards for the admission of defense evidence in the putting forth a defense. Where, as here, a criminal defendant has exercised his constitutional right to a trial by jury, his right to present a full and complete defense includes the right to have a jury (rather than the trial court) consider and weigh all relevant and probative evidence.

South Carolina's standards for determining the admissibility of third-party guilt evidence plainly violate these rights. By precluding the admission of such evidence when the prosecution's case is "strong," South Carolina denies the defendant the opportunity to have his evidence considered by the jury, even when such evidence supports his claim that he was not the person who committed the crimes of which he is accused. Moreover, South Carolina's standards unlawfully usurp the jury's constitutional role by empowering the trial judge to weigh the evidence and make the assessment of whether the prosecution's case is "strong.." In addition, the South Carolina standards are arbitrary because they establishes a far higher threshold for admitting third-party guilt evidence than other types of evidence relating to the defendant's guilt or innocence (including alibi evidence, even though both alibi evidence and third-party guilt evidence go to the same defense – that the defendant did not commit the crime for which he is charged).

Under the rulings of this Court, States may establish rules of evidence that serve legitimate State interests (such as the need to ensure that evidence is trustworthy and that the admission of certain evidence will not result in distraction and "mini-trials" on irrelevant issues. But the Court has also emphasized that such rules must be reasonable, non-arbitrary, and not disproportionate to the State's legitimate interests.

That standard is certainly one that States can meet without compromising their interests. For example, a State could satisfy constitutional requirements if its rule of evidence allowed a defendant to introduce evidence of the guilt of a third party as long as (1) his proffered evidence taken as a whole establishes probable cause to believe that the third party committed the offense for which the defendant is being tried and (2) the proffered evidence would (with one exception described herein) otherwise be admissible against the third party under the State's applicable rules of evidence if the State elected to prosecute the third party, rather than the defendant, for the alleged crimes.

South Carolina's standards, by contrast, fall woefully short of meeting constitutional requirements. Under any reasonable interpretation of due process and a defendant's Sixth Amendment rights, a defendant cannot receive a fair trial when State rules of evidence exclude all of his evidence of third-party guilt from the jury's consideration whenever the trial judge unilaterally determines that the prosecution's case is "strong." Yet that is precisely what happened in Petitioner's case. Because such a result is so flatly contrary to the Constitution, this Court should reverse Petitioner's conviction and death sentence.

I. FUNDAMENTAL FAIRNESS AND DUE PROCESS.

The ability of a defendant to tell his side of the story at trial with relevant and probative evidence that he chooses to present in his favor is an essential component of due process. Grounded in the Sixth and Fourteenth Amendments, this Court has established in its decisions an irreducible minimum due process standard which requires that a State must provide a person charged with a crime with a meaningful opportunity to put forth a full and complete defense before a jury. South Carolina's requirements regarding the admissibility of evidence of third-party guilt, however, fail to meet this standard.

This Court has recognized that due process confers on a criminal defendant the right to put forth a full and complete defense before a jury, including the right to present all relevant and probative evidence that is favorable to a defense, subject to reasonable evidentiary rules, and to have that evidence considered by a jury in determining a defendants guilt. See, *e.g.*, *United States* v. *Scheffer*, 523 U.S. 303, 315 (1998); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). The Court has expressly recognized that, under the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment, a criminal defendant must be given "a meaningful opportunity to present a complete defense"—*i.e.*, a right to make a full defense, and tell his or her story, by presenting relevant and probative evidence that supports his case. See, *e.g.*, *California* v. *Trombetta*, 467 U.S. 479, 485 (1984). See also *Crane*, 476 U.S. at 689 (finding unconstitutional a Kentucky rule which barred defendant from placing evidence of the facts and circumstances surrounding his confession, which had been found by a judge pre-trial to have been voluntary before jury, as violating his right to the fair opportunity to present a defense); *Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987) (Arkansas *per se* rule excluding all hypnotically refreshed testimony of defendant struck down as impermissibly restricting defendant's right to conduct her own defense). That right necessarily includes the right to present that complete defense and tell one's story directly to a jury, by virtue of the right to a jury trial guaranteed by the Sixth Amendment. See *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968).

It is the fundamental role of counsel for the defense to present such evidence and to ensure that all relevant facts are before the jury for their decision. See *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987) (defense counsel's role is "to ensure that the adversarial testing process works to produce a just result" (citation omitted)); *Powell* v. *Alabama*, 287 U.S. 45, 60

(1932) (defendants rape conviction and death sentence reversed because their new counsel performed no preparation nor investigation and presentation of facts). Often, this is done by challenging the prosecution's case alone. While a defendant has no obligation to present a defense, where evidence of actual innocence exists, it is an imperative in our adversarial system of criminal justice that the defense be afforded every reasonable opportunity to adduce his or her own facts and to present them to the fact-finders. The prosecution controls the nature and the timing of the charge, and the jury hears the prosecution's evidence first. As a practical matter, a defense presentation is often necessary in order for there to be any reasonable prospect of persuading a jury to return a verdict of not guilty. Where a defendant claims innocence, a jury, having heard the prosecution's case, will naturally expect a defendant to present evidence supporting that claim of innocence. To the extent that a defendant does not or cannot fully and completely present his or her case, the jury is likely to regard the prosecution's facts as unrebutted.

This Court has acknowledged these realities repeatedly. For example, in *Old Chief* v. *United States,* 519 U.S. 172, 188 (1997), the Court stated that "a juror's obligation to sit in judgment" involves "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." The Court further emphasized that in evaluating the evidence that a party proffers in presenting a case, a trial judge must recognize a "party's need for evidentiary richness and narrative integrity," because "[i]f [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." *Id.* (second alteration in original). Although *Old Chief* involved evidence that the prosecution sought to introduce in a criminal trial, it is equally applicable to the defense, because only by allowing a defendant to put forth a full and complete defense, or

completely and fully tell his or her story, can "jurors' expectations be satisfied" to avoid a jury unjustly "penalizing" a defendant by "drawing negative inferences" against that defendant because of a lack of narrative integrity.

The numerous cases of this Court recognizing a defendant's right to present a complete defense make clear that this right includes two critical components. *First*, the defendant has the constitutional right to have the jury consider the evidence that he wishes to present in support of his defense in the determination of his or her guilt. This right is evidenced by numerous rulings of this Court, including: the Court's ruling that a defendant has a constitutional "right to offer the testimony of witnesses [to the jury], and to compel their attendance, if necessary," *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967) (compulsory process clause of Sixth Amendment); the Court's recognition of a defendant's right to confront, cross-examine, and impeach all witnesses testifying before the jury, even witnesses called by defendant, *Crawford* v. *Washington*, 541 U.S. 36, 42 (2004) (confrontation clause of Sixth Amendment) and *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973) (same); the duty of the State to reveal to the defendant the contents of plea agreements with key state witnesses which could effect reliability and credibility determinations of the jury, *Giglio* v. *United States*, 405 U.S. 150, 155-156 (1972) (due process clause of Fourteenth Amendment); a State's duty to turn over to a criminal defendant exculpatory evidence in its possession which could raise a reasonable doubt before the jury as to the defendant's guilt, even in the absence of a request for such evidence by the defendant, *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (compulsory process clause of Sixth Amendment); the prohibition against intentional post-indictment delaying activity by a State which results in the loss of evidence that prejudices the intended defense, *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (speedy-trial guarantee of Sixth Amendment); the Court's recognition of the right of a

defendant to the State's assistance in compelling the attendance and testimony at trial of favorable defense witnesses, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 55 (1987) (compulsory process clause of Sixth Amendment); and the Court's recent decisions ruling that a criminal defendant has the constitutional right to have all facts which go to guilt or sentencing placed before jury, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (Sixth Amendment right to jury trial and due process clause of Fourteenth Amendment), *Blakely* v. *Washington*, 542 U.S. 296, 313-14 (2004) (same), and *United States* v. *Booker*, 125 S. Ct. 738, 749-50 (2005) (Sixth Amendment right to jury trial).

Second, the Sixth Amendment gives a defendant the right to have a jury, rather than a judge, make the ultimate determination of all facts which go to the elements of guilt or to the sentence imposed in a criminal charge. State and federal procedures that remove fact-intensive decision making from the hands of the jury have therefore repeatedly been struck down by this Court. See, *e.g.*, *Apprendi*, 530 U.S. at 491-92 (New Jersey Hate Crime Statute held unconstitutional because it allowed trial judge to increase time of sentence for possession of firearm conviction beyond that proscribed in the firearm statute upon finding of the existence of aggravating facts by judge, rather than by jury); *Blakely*, 542 U.S. at 313-14 (Washington sentencing statute, which allowed judge to exceed maximum sentence for that proscribed by criminal statute based on judge's finding of facts neither admitted by defendant nor found by jury, held unconstitutional); *Booker*, 125 S. Ct. at 749-50 (Federal Sentencing Act unconstitutional to extent that it mandated the imposition of sentences in the higher range under the criminal statute violated, based upon facts found by a judge and not a jury). Accordingly, as part of the right to present a complete defense, a defendant has the "right to present the defendant's version of the facts . . . *to the jury*" in order for the jury to "decide where the truth lies," *Washington* v. *Texas*, 388 U.S. at 18-19 (Sixth Amendment

right to jury trial) (emphasis added); the right to present to the jury all facts which may affect the jury's reliability and credibility determinations of the State's witnesses, *Giglio*, 405 U.S. at 155-56 (due process clause of the Fourteenth Amendment); and the "right to put before a jury evidence that might influence the determination of guilt," *Ritchie*, 480 U.S. at 56 (Sixth Amendment right to jury trial).

A defendant's right to have a jury rather than a judge make all determinations of facts that go to guilt, includes—except in limited circumstances[2]—the right to have the jury, rather than a judge make the credibility and reliability determinations as to evidence placed before it, *Rock*, 483 U.S. at 53-55 (based on Sixth Amendment right to jury trial); answer questions of materiality as to any facts which go towards issue of guilt, *United States* v. *Gaudin*, 515 U.S. 506, 518-19 (1995) (due process clause of the Fifth Amendment and Sixth Amendment right to jury trial); make determinations as to all elements of a crime be free of conclusive presumptions, *Neder* v. *United States*, 527 U.S. 1, 10 (1999) (Sixth Amendment right to jury trial); and determine the existence of "any fact [other than fact of a prior conviction] that increases the penalty for a crime beyond the prescribed maximum," *Apprendi*, 530 U.S. at 490 (same). In short, the Constitution requires that in a criminal trial before a jury

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[2] This Court has stated that "'relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion) (quoting Fed. R. Evid. 403). The evidence of third-party guilt proffered by Petitioner in this case does not fall into any of these categories. The trial judge conceded that the evidence was relevant because it went to the core issue of whether Petitioner was the person who raped, robbed, and murdered the victim. As discussed below, both the trial judge and the Supreme Court of South Carolina excluded this evidence for reasons totally unrelated to any danger of prejudice, delay, misleading the jury, or confusion of the issues.

"questions of credibility," *Crane*, 476 U.S. at 688, and determinations of evidentiary "weight," *Pinto* v. *Pierce*, 389 U.S. 31, 33-34 (1967), are the province of juries, not judges.

This Court has also rejected the very reasoning that South Carolina relies upon to justify its overly stringent standard. The Court has held that when a defendant seeks to have the jury consider evidence that is relevant to the charges at issue, a State cannot restrict or impair that right on the ground that allowing such evidence would result in a "mini-trial" or "sideshow." See, *e.g.*, *Crane*, 476 U.S. at 686-88. In *Crane* the State argued that a defendant should not be allowed to present to the jury the facts and circumstances of his confession of guilt to show that his confession was unworthy of belief due to the manner in which it was obtained, because the confession already had been found by a judge to have been voluntary in a pre-trial conference. The Court, focusing on the Constitution's guarantee that a defendant be provided a "meaningful opportunity to present a complete defense," *id.* at 690 (citation omitted), rejected the State's argument that allowing the jury to consider the defendant's proffered evidence would result in relitigating a resolved legal matter and stated:

> [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 689.[3]

The right of a defendant to put forth a full and complete defense before a jury, and have the jury make all factual determinations as to the elements of guilt, has even indirectly impacted this Court's analysis in cases dealing with the burdens of proof that the state and defendant must bear in criminal trials. For example, in *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987), this Court held that Ohio's rule requiring a defendant to prove by a preponderance of the evidence the affirmative defense of self-defense did not violate due process because such rule did not prevent the defendant from placing before the jury any evidence supporting his claim of self-defense for the purpose of creating reasonable doubt as to whether the state had proven the necessary element of purposeful killing with prior calculation and design to sustain a conviction of murder. Plainly referring to the right of the defendant in that case to tell her story to the jury, this Court stated:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in

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[3] The Court noted that whether a confession was voluntary was a legal matter, to be properly resolved by a judge, while credibility of a confession was entirely a factual matter to be placed before and determined by a jury. *Crane*, 476 U.S. at 688-89. Allowing the latter did not undercut the function of the former because, as the Court stated, the former simply served to ensure that voluntary confessions obtained through the use of "certain interrogation techniques" held to be "so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment" are not placed before a jury in the first instance. *Id.* at 687. The Court added that a confession which has met the minimum legal threshold of being voluntary because of the absence of offensive "interrogation techniques" may still be challenged as unreliable because of the "physical and psychological environment that yielded the confession" which can be "of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence," and that even confessions "found to be voluntary, are not conclusive of guilt." *Id.* at 688-89.

> determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard.

Id. at 233-34 (emphasis added) (citation omitted). Clearly, under *Martin* and the other above-described decisions of this Court, a State may not erect tests of evidentiary weight – whether through special rules of evidence, allocations of burdens of proof, or otherwise – that impair a defendant's right to make a full and complete defense.

II. SOUTH CAROLINA'S STANDARDS REGARDING THE ADMISSIBILITY OF THIRD-PARTY GUILT ARE ALSO UNCONSTITUTIONAL BECAUSE THEY ARE ARBITRARY AND DISCRIMINATORY.

South Carolina's standards governing the admissibility of evidence of third-party guilt also violate Petitioner's constitutional rights because they unfairly, and arbitrarily, impose a severe burden upon one particular type of defense evidence relating to the issue of whether the defendant is guilty of the crimes of which he is accused. These standards are unfair because the prosecution labors under no similar, special restrictions in seeking to present evidence to a jury supporting its allegations of a defendant's guilt. They are arbitrary because no other type of evidence relating to the issue of a defendant's guilt is subject to similarly burdensome requirements and because South Carolina's regular Rules of Evidence already protect against the admission of evidence that might confuse the issues or mislead the jury.

Although a defendant's right to present relevant evidence is subject to reasonable restrictions, that right is violated if a State's evidentiary standards are arbitrary or disproportionate to the State interests that they are purportedly designed to serve. See, *e.g.*, *Scheffer*, 523 U.S. at 308; *Michigan* v. *Lucas*, 500 U.S. 145, 151 (1991); *Rock*, 483 U.S. at 55-56.

Thus, a State cannot constitutionally apply one evidentiary standard to the prosecution but a different one to the defendant. *See, e.g., Washington* v. *Texas*, 388 U.S. at 22 (finding irrational a Texas rule that permitted accomplices to testify for the State, but not for the defendant). Nor may a State apply arbitrary rules of evidence to exclude relevant and probative evidence offered by the defense. *E.g., Rock*, 483 U.S. at 55 (holding that Arkansas' *per se* rule excluding all hypnotically refreshed testimony was an arbitrary infringement of the defendant's right to present testimony); *Chambers* v. *Mississippi*, 410 U.S. at 294-302 (finding, as a violation of defendant's "right to a fair opportunity to defend against the State's accusations," the refusal of Mississippi's trial court to allow the admission of an accused's evidence of third-party guilt on the basis of the State's hearsay rule and common-law rule that a party cannot impeach his own witness).

South Carolina's special standards governing the admissibility of third-party evidence are arbitrary in two specific ways. First, South Carolina applies those standards to no other type of evidence offered at trial. Second, South Carolina's standards govern only the admissibility of evidence that a third party committed the alleged crimes, and not to evidence supporting an alibi – even though both types of evidence make the same claim (that another person committed the crime). The State cannot provide any rational basis for these distinctions, for its special standards regarding the admission of third-party guilt evidence are grossly disproportionate to any legitimate State interests.

A. No Other Type Of Evidence Offered In Criminal Trials In South Carolina Regarding A Defendant's Guilt Or Innocence Is Subject To The Additional Standards Of Admissibility That The State Applies To Evidence Of Third-Party Guilt.

In South Carolina, evidence relating to the issue of the defendant's guilt or innocence is ordinarily governed only by the South Carolina Rules of Evidence. Under Rules 401 and

402, such evidence is generally admissible in South Carolina courts as long as it is "relevant evidence" – which the rules define as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable *or less probable* than it would be without the evidence."[4] South Carolina courts have affirmed this principle of broad admissibility, stating: "Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent."[5] Rule 403 provides, however, that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[6]

The relevance requirements of Rules 401 and 402, and the balancing test set forth in Rule 403, apply to any evidence that the prosecution seeks to introduce supporting its claim that the defendant committed the alleged crimes.[7] And they

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[4] *See* S.C. R. Evid. 401 (emphasis added); *id.*, Rule 402. *See also, e.g., State* v. *Alexander*, 401 S.E.2d 146, 148 (S.C. 1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.").

[5] *E.g., State* v. *Schmidt*, 342 S.E.2d 401, 403 (S.C. 1986); *State* v. *Sweat*, 606 S.E.2d 508, 513 (S.C. Ct. App. 2004).

[6] *See* S.C. R. Evid. 403. This rule is identical to Rule 403 of the Federal Rules of Evidence. The Supreme Court of South Carolina adopted the language of the federal rule relating to the danger of unfair prejudice in *State* v. *Alexander*, 401 S.E.2d at 149.

[7] *See, e.g., State* v. *Sweat*, 606 S.E.2d at 513-17 (finding that, in criminal trial where defendant was accused of burglary, assault and battery with intent to kill, and assault of a high and aggravated nature, prosecution's evidence of defendant's prior abuse of ex-girlfriend (and resulting conviction) were relevant to issues of motive and intent, and probative value of evidence was not outweighed by the danger of unfair prejudice); *State* v. *Douglas*, 597 S.E.2d 1, 5-6 (S.C. Ct. App. 2004) (reversing defendant's conviction for murder and armed robbery of her

apply to evidence that the defendant seeks to offer in support of his claim of innocence (which is "relevant evidence," because it tends to make it "less probable" that the defendant is guilty as charged).[8] As long as the defendant's evidence satisfies these standards (and the other standards set forth in the Rules of Evidence), the evidence supporting his claim will be admitted – *unless* that evidence tends to show that a specific individual other than the defendant committed the crime. Under this peculiar exception, the defendant must *further* satisfy South Carolina's special standards governing evidence of third-party guilt, including the requirement of demonstrating that the evidence raises a "reasonable inference" of his innocence. Even if the defendant is able to do so, his evidence *still* will be not be admitted if the trial court finds that the prosecution's case is "strong."

Under any reasonable interpretation, the Due Process Clause (including a defendant's rights under the Sixth Amendment, as applied to the States by the Due Process

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husband because trial court erred in admitting testimony by prosecution witness, an insurance agent, that defendant had expressed interest in purchasing – but had not actually purchased – an insurance policy on her husband's life; such testimony was irrelevant to issue of motive because there was no insurance policy from which defendant could benefit, and such testimony was clearly prejudicial to defendant); *State* v. *Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001) (holding that, in trial for murder, kidnapping, and assault, trial judge erred in admitting into evidence a "rap" song written by defendant as an admission against interest; lyrics of song had "minimal probative" value, given their vagueness, and any probative value was outweighed by its unfair prejudicial impact as evidence of defendant's bad character).

[8] *See, e.g., Schmidt*, 342 S.E.2d at 402-03 (reversing defendant's conviction because trial judge improperly excluded defendant's offer of testimony showing hard feelings between the child's family and defendant's family; such evidence was "clearly relevant" and its exclusion denied defendant a fair trial, since his entire defense at trial was that he did not commit the alleged act and that the charge of criminal sexual conduct with a minor was concocted by child's parents as part of a "vendetta" against him).

Clause) requires that the same evidentiary standards be applied at trial to evidence regarding the defendant's guilt or innocence, regardless of whether the evidence is presented by the prosecution or the defense. As this Court has recognized in the context of the Due Process Clause of the Fifth Amendment, "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).[9] The special evidentiary standards that South Carolina imposes on evidence of third-party guilt constitute precisely such discrimination.

There can be no legitimate justification for subjecting a defendant's evidence of third-party guilt to additional evidentiary "hurdles" that the prosecution is not required to meet *even when the prosecution seeks to introduce the same types of evidence.* In its response to the petition for *certiorari* in this case, the State defended its special evidentiary rules by (1) accusing the Petitioner of requesting this Court to impose uniform evidentiary standards on the States, and (2) rationalizing that the special evidentiary requirements are intended to ensure that any evidence of third-party guilt considered by the jury will be "trustworthy," "reliable," and "competent." The State's first argument is a red herring. Neither the Petitioner nor *amici* ask that this Court adopt uniform national evidentiary standards for State courts; rather, they request only that the Court make clear that South Carolina's special evidentiary standards regarding the admissibility of third-party guilt evidence are contrary to the requirements of the Due Process Clause.

The State's more germane suggestion that its special standards are necessary to preclude untrustworthy, unreliable, or incompetent evidence is nonetheless also without justification. South Carolina courts already possess ample

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[9] *See also, e.g., Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 213-18 (1995); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 601 (1976).

authority, under the South Carolina Rules of Evidence, to exclude untrustworthy, unreliable, or incompetent evidence.[10] They also allow trial cou[illegible]s to exclude, under Rule 403, evidence that "confuses the issues" or evidence that is "misleading to the jury." Such decisions are reviewed on a highly deferential "abuse of discretion" standard.[11] The existing rules even specifically address the admissibility of statements of third parties who acknowledged that they committed the alleged crime, stating that such statements are not admissible for the purpose of exculpating a criminal defendant "unless corroborating circumstances clearly indicate the trustworthiness of the statement." S.C. R. Evid. 804(b)(3).[12]

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[10] *See, e.g.*, S.C. R. Evid. 602 (prohibiting testimony of witness about a matter of which the witness has no personal knowledge); S.C. R. Evid. 802 (general rule against admissibility of hearsay).

[11] *See, e.g., State* v. *McLeod*, 606 S.E.2d 215, 218-19 (S.C. Ct. App. 2004); *State* v. *Saltz*, 551 S.E.2d 240, 244 (S.C. 2001); *State* v. *Tucker*, 462 S.E.2d 263, 265 (S.C. 1995). The South Carolina appellate courts will reverse the decision of the trial judge under Rule 403 regarding the comparative probative value of the evidence with the danger of unfair prejudice, confusion of the issues, or misleading of the jury "only in exceptional circumstances." *State* v. *Horton*, 598 S.E.2d 279, 286 (S.C. Ct. App. 2004).

[12] In its explanatory notes accompanying this provision, the Supreme Court of South Carolina stated that the provision "is consistent with South Carolina law," (citing *State* v. *Doctor*, 413 S.E.2d 36 (S.C. 1992)). Furthermore, The court's citation of *Doctor* is ironic, because the evidence at issue in that case was proffered by the defendant to show that a third party had committed the crime – and the court ruled that the exclusion of such evidence at trial was error, *without* applying the additional evidentiary standards that it applied in Petitioner's case. In *Doctor*, where the defendant was accused of armed robbery, the State alleged that the defendant, accompanied by two other boys, demanded that the victim turn over the keys to his car and, after the victim initially refused, the defendant pointed a gun to his head to force him to surrender his keys. At trial, one minor testified that he and two other boys were the individuals who had committed the theft of the car – and that the defendant was not involved. When the other two minors implicated by this testimony

For these reasons, there can be no justification for subjecting evidence of third-party guilt to additional evidentiary requirements to achieve this result, when other types of evidence relating to the defendant's guilt or innocence is not subject to the same requirements. If a defendant seeks to offer testimony of witnesses that a third party committed the alleged crime, or was at or near the scene of the crime at the time the crime was committed, due process demands that the testimony should be governed by the same standards regarding the admissibility of all other evidence going to the defendant's guilt or innocence.[13]

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refused to testify (invoking their Fifth Amendment privilege), the defendant then attempted to introduce the testimony of his investigator, who would have testified that both of the minors had confessed to the theft, and that their confessions matched in detail the testimony of the minor who did testify. The Supreme Court of South Carolina held that the trial court's exclusion of such evidence was reversible error, noting that the testimony was "valuable to the defendant and its exclusion was not harmless." 413 S.E.2d at 38. In ruling that the testimony was admissible, the court did not determine whether the this third-party guilt evidence satisfied the standards established in both *State* v. *Gregory*, 16 S.E.2d 532 (S.C. 1941) and *State* v. *Gay*, 541 S.E.2d 541 (S.C. 2001), which are at issue in this appeal.

[13] Comparing South Carolina's third-party guilt evidence standard to other special evidentiary standards, such as standards that apply to evidence of an accuser's sexual history in a rape case, would be misplaced. For example, "rape shield" statutes impose restrictions on a defendant's ability to present evidence of the accuser's sexual history because of a "legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan* v. *Lucas*, 500 U.S. at 150. *See also State* v. *Finley*, 387 S.E.2d 88, 90 (S.C. 1989) (State's rape shield stature reflects its interest in protecting criminal sexual assault victims). Those concerns are fundamentally different from concerns about reliability and distraction. Furthermore, the evidentiary restrictions that rape shield statutes impose are vastly different from – and far less burdensome than – South Carolina's requirements regarding third-party guilt evidence. First, rape shield statutes do not prohibit all evidence of a victim's prior sexual activity, and do not make the admissibility of such evidence dependent on

B. South Carolina's Special Standards Of Admissibility Regarding Evidence Of Third-Party Guilt Are Arbitrary Because They Do Not Apply To Alibi Evidence, Even Though Both Types Of Evidence Involve The Same Basic Defense.

The burdensome restrictions that South Carolina imposes on the admissibility of evidence of third-party guilt stand in stark contrast to the evidentiary standards that South Carolina has established regarding alibi evidence. Both types of evidence involve the same basic defense: that the defendant is not the person who committed the crime. Evidence of third-party guilt seeks to show that a specific individual other than the defendant committed the crime, whereas alibi evidence is presented to establish that the defendant *could not have*

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whether the prosecution has presented "strong" evidence of a defendant's guilt. *See, e.g.*, S.C. Code Ann. § 16-3-659.1 (allowing evidence of prior sexual conduct between accuser and defendant to be admitted, if judge finds that it is relevant and that probative nature of evidence outweighs any prejudice); *Finley*, 387 S.E.2d at 90 (defendant should have been permitted to introduce evidence of accuser's sexual activity on evening before alleged rape because evidence was relevant to issues of motive, bias, and prejudice on part of accuser); *State* v. *Grovenstein*, 530 S.E.2d 406, 411 (S.C. Ct. App. 2000) (holding that, notwithstanding rape shield statute, trial court erred in excluding defendant's preferred evidence of child accusers' sexual experience, because it was relevant to defendant's contention that he was not the source of their ability to testify about the sexual conduct they alleged); *State* v. *Lang*, 403 S.E.2d 677, 678 (S.C. Ct. App. 1991) (holding that defendant was entitled to introduce evidence of victim's sexuality to im-peach victim's credibility). Third, rape shield laws like South Carolina's impose no special evidentiary standards that a defendant's evidence must meet in order to be admissible (such as raising a "reasonable inference" of innocence), but instead require only that the defendant provide advance notice to the court and the prosecution when he proposes to offer such evidence. S.C. Code Ann. § 16-3-659(2). Finally, both this Court and the South Carolina courts have recognized that even when particular evidence is otherwise precluded under a rape shield statute, such evidence must be admitted when precluding such evidence would violate a defendant's constitutional rights. *See Michigan* v. *Lucas*, 500 U.S. at 150-53; *Finley*, 387 S.E.2d at 90.

committed the crime because "he was not at the scene of the crime at the time of its commission." *State* v. *Robbins*, 271 S.E.2d 319, 320 (S.C. 1980).[14] Yet, although both types of evidence seek to establish that someone else committed the crime, alibi evidence is not subjected to the evidentiary hurdles that confront evidence of third-party guilt.

Under the rules of criminal procedure in the South Carolina courts, upon written request of the prosecution (which must state in the request the time, date, and place at which the alleged offense occurred), a defendant seeking to present alibi evidence must serve the prosecution with a written notice of his intent to offer such evidence. The defendant must also describe in that notice the specific place(s) where the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish his alibi. S.C. R. Crim. P. 5(e)(1). If the defendant fails to provide the notice, the trial court may exclude the testimony of any undisclosed witness.[15]

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[14] Thus, under South Carolina law, a defendant can simply allege that someone else committed the alleged crime without showing an alibi. *See, e.g., State* v. *Anders*, 483 S.E.2d 780, 785 (S.C. Ct. App. 1997) (charge on alibi is not necessary when accused merely denies committing the crime); *State* v. *Schrock*, 322 S.E.2d 450, 452 (S.C. 1984) (accused person has no obligation to prove that he was somewhere else at the time and place of the crime).

[15] S.C. R. Crim. P. 5(e)(4). The rule, however, provides that the defendant shall be permitted to testify on his own behalf to support his claim of alibi regardless of whether he included himself in the notice. Id. The rule also requires that after the defendant serves his notice of alibi, the prosecution must serve upon the defendant or his attorney the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged crime. If the prosecution fails to disclose particular witnesses in its notice, the trial court may exclude such testimony. S.C. R. Crim. P. 5(e)(2), (e)(4). *See also Wardius* v. *Oregon*, 412 U.S. 470 (1973) (holding that the Due Process Clause of the Fourteen Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants).

Other than this procedural requirement, however, alibi evidence is not subject to special evidentiary standards or requirements in South Carolina criminal trials. Indeed, the South Carolina courts have repeatedly emphasized that alibi is *not* an affirmative defense that imposes the burden of proof on that issue upon the defendant; the burden remains at all times on the prosecution to prove that the defendant was present at the scene of the crime at the time alleged, and actually committed the crime.[16]

Under South Carolina law, a defendant is permitted to produce any evidence that supports his alibi, as long as the evidence meets the evidentiary standards (such as relevance) applicable to evidence generally under the South Carolina Rules of Evidence. That proof must consist of evidence that "attempt[s] to show the impossibility of being involved in [the] crime due to absence from the scene." *Anders*, 483 S.E.2d at 785.[17] Furthermore, the defendant is not required to produce *any* witnesses of his own to establish an alibi; the alibi "may be established as well by the testimony of witnesses for the prosecution." *State* v. *Mayfield,* 109 S.E.2d 716, 724 (S.C. 1959).

Trial courts in South Carolina do not perform the same "gatekeeping" function regarding alibi evidence that they are required to perform when the defendant seeks to offer evidence that a named third party committed the alleged crime. The Supreme Court of South Carolina has long made it clear that alibi evidence is not to be subjected to different evidentiary standards. For example, in reversing a conviction

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[16] *See, e.g., State* v. *Schrock*, 322 S.E.2d at 452; *Roseboro* v. *State*, 454 S.E.2d 312, 313 (S.C. 1995); *State* v. *Mayfield*, 109 S.E.2d 716, 724 (S.C. 1959).

[17] *See also, e.g., State* v. *Diamond*, 312 S.E.2d 550, 550 (S.C. 1984) ("To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.") (quoting *State* v. *Robbins*, 271 S.E.2d at 320).

because the trial judge had instructed the jury that alibi evidence "is always to be received with caution," the Supreme Court of South Carolina stated that such evidence:

> [I]s entitled to be considered by the jury under all the facts and circumstances of the case the same as any other defense, and it is for them to say what credence they give to it and do not have to receive it with any more caution than they do any other evidence in the case.

State v. *Smalls*, 82 S.E. 421, 422 (S.C. 1914). The trial court may refuse to allow the jury to consider a defendant's claim of alibi only if the defendant has presented *no* evidence tending to show that at the time of the alleged crime he was at an entirely different location, making it impossible for him to have been at the crime scene.[18]

South Carolina courts have regarded the defendant's right to present alibi evidence as a critical prerequisite to a fair trial. For example, the Supreme Court of South Carolina has recognized that "[A]n alibi charge is considered especially crucial when the [prosecution's] evidence is entirely circumstantial." *Roseboro* v. *State*, 454 S.E.2d 312, 313 (S.C. 1995). Thus, under South Carolina law, the failure of a trial court to give an alibi charge to the jury, where the defendant claims to have been at another place at the time of the crime, is reversible error. *Riddle* v. *State*, 418 S.E.2d 308, 309 (S.C. 1992); *State* v. *Robbins*, 271 S.E.2d at 320. Under the decisions of the South Carolina courts, defense counsel will be found to have rendered deficient representation if it failed

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[18] *See, e.g., State* v. *Diamond*, 312 S.E.2d at 551 (trial judge properly refused to charge jury on law of alibi, because accused could not recall at trial his whereabouts at the time of the crime, and mere denial of one's presence at the scene does not constitute an alibi); *State* v. *Elmore*, 308 S.E.2d 781, 784 (S.C. 1983) (trial judge did not err by failing to charge the law of alibi, since defendant at trial was unable to remember, with any degree of certainty, where he was at the time of the crime, and thus did not remove possibility that accused was guilty as charged).

to request an alibi charge when evidence existed in the record that the defendant was at another location at the time of the crime.[19]

* * * *

South Carolina's vastly different – and less stringent – standards for the presentation of alibi evidence only further confirm the arbitrariness of its standards governing the admissibility of third-party guilt evidence. Although both types of evidence support a defendant's claim that he did not commit the crime, evidence of third-party guilt, in effect, goes one step further and identifies the specific perpetrator of the crime (in contrast to alibi evidence, which simply shows that *someone* other than the defendant was the perpetrator). Yet any defendant who goes that extra step in his narrative, rather than merely leaving the jury "in the dark" as to the identity of the actual offender, is subjected to additional, burdensome evidentiary standards that effectively preclude the admission of such evidence. There can be no rational basis for such a distinction, other than to penalize a defendant who attempts to provide more specifics to support his case, and deny a defendant his or her right to present relevant evidence to the jury at trial. South Carolina's standard presents a clear constitutional error in that it substantially infringes upon a fundamental right of the accused – the constitutional right to a fair opportunity to defend against the State's accusations (including the right to offer evidence supporting a defense that a particular third party was the individual who committed the crimes). Accordingly, the defendant's conviction and death sentence cannot stand.

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[19] *Roseboro* v. *State*, 454 S.E.2d at 313; *Ford* v. *State*, 442 S.E.2d 604, 606 (S.C. 1994); *Riddle* v. *State*, 418 S.E.2d 308 (S.C. 1992). In these circumstances, the courts will make a finding of ineffective assistance of counsel (and will reverse the defendant's conviction) unless defense counsel articulates a valid reason for employing such a strategy. *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted

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